No. 82-2137

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JBL ENTERPRISES, INC.,
JEAN ROBINSON and
LOIS JEAN MILLION,

Petitioners,

v.

JHIRMACK ENTERPRISES, INC.

Respondent.

REPLY BRIEF FOR PETITIONER

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DATED: September 22, 1983

Respondent Jhirmack Enterprises, Inc. argues that the petitioners' "total failure of proof" warranted the dismissal of petitioners' price fixing claim in this case. Yet respondent does not dispute that evidence was presented that beauty salons insisted upon exclusive distribution of Jhirmack products (shampoos, conditioners and other hair care and cosmetic items) "primarily in order to avoid price competition" with drug stores and other over-the-counter ("OTC") outlets. JBL App. E-59.

The district court labeled this avoidance of price competition, a "patently anticompetitive practice". JBL App. E-41. Moreover, the district court found evidence that Jhirmack received complaints from salon owners about Jhirmack products being sold by OTC outlets, and took steps to identify the distributors involved in selling to OTC

discounting outlets and to discourage such sales. JBL App. E-9 to E-10. The petitioners are distributors who sold Jhirmack products to persons who sold them to OTC outlets, and Jhirmack knew that petitioners were the source of certain products found in OTC outlets.

Both the district court and the Court of Appeals recognized that a combination existed with the purpose and effect of eliminating retail price competition between salons and OTC outlets, but concluded that the evidence would not sustain a price-fixing claim because there was no enforced compliance with a particular price schedule, JBL App. B-10, and because the petitioners were not competitors of the salons who were concerned about price competition. JBL App. B-10 to B-11.

This Court has held that a viable price-fixing claim does not depend

upon a setting of prices at exact levels. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, (1940). Moreover, petitioners as wholesalers can challenge a retail price-fixing scheme because their removal as a source of supply to discounting retailers was a means of accomplishing the anticompetitive result. Blue Shield of Virginia v. McCready, ____ U.S. ____, 102 S.Ct. 2540, 2549 (1982).

The gist of respondent's opposition is that petitioners expressly disavowed their price-fixing claim (an argument belied by the fact that both the district and appellate courts considered and ruled upon the claim) and that petitioners have presented no important question of law for this Court to consider. Respondent asserts that this case "vindicates the wisdom of Sylvania", because Jhirmack's limited distribution of its products

fostered interbrand competition.[1/]

It is critically important, however, that this Court make clear that a mere claim of good intention is not sufficient to license "patently anticompetitive conduct". A distinction must be retained as to whether distribution restrictions arise because the producer implements them to promote competition with other producers or because the producer's customers insist upon the restriction merely to avoid price competition. This distinction has been recognized in Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3rd Cir. 1979), but has not been addressed by this Court. This is the issue which petitioners present for review, and it merits this Court's attention.

1/ Curiously, Jhirmack ignores the fact that its interrogatory and deposition responses deny the existence of any such restrictions. CR 393, Decl., Exs. V and W.

The unfortunate result of Sylvania and its progeny is that the focus of anittrust attention has been only upon the enhancement of interbrand competition among manufacturers. The antitrust laws must also continue to be concerned with preservation of both interbrand and intrabrand competition among different types of retailers. To allow retailers to avoid the rigors of the free market by stifling price competition is to stand antitrust law on its head. This action presents facts which reveal a clear attempt at price-fixing.[2/] Certiorari should be granted to put a stop to such collusion.

DATED: Septebmer 22, 1983

Respectfully submitted,

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2/ The price-fixing claim was not abandoned by petitioners:

" THE COURT: What else are they [petitioner] complaining about?

MR. KITHAS: Well, the only other complaint is that this action by the - - Jhirmack in terminating them is motivated by price." (RT 1137:13-18)